Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SENIOR AIRMAN BARRY V. O'CONNOR,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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December 2001

25pp

QUESTION PRESENTED

Whether petitioner's plea of guilty to offenses under 18 U.S.C. § 2252A is involuntary because he had an incomplete understanding of the offenses when the military judge explained the offenses using the unconstitutionally vague and overbroad definitions of "child pornography" contained in 18 U.S.C. § 2256.

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The petitioner, Senior Airman Barry V. O'Connor, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on September 6, 2001.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. O'Connor*, USCA Dkt. No. 01-0403/AF, is located at Appendix B. The unpublished opinion of the United States Air Force Court of Criminal Appeals (No. ACM 33671, January 25, 2001) is located at Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on September 6, 2001.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." The Due Process Clause of the Fifth Amendment to the United States Constitution states that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

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[1] Appendix B, p. 2a.

Section 2256(8) of Title 18, United States Code, contains the following definition that applies to a violation of Section 2252A of the same title:

> "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where–
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct

STATEMENT OF THE CASE

On March 4 and 5, 1999, the petitioner was tried by a general court-martial composed of a military judge sitting alone. The petitioner pled guilty to wrongfully and knowingly receiving or distributing child pornography in violation of Section 2252A(a)(2)(A) and wrongfully and knowingly possessing computer disks and computer tapes that contained three or more images of child pornography in violation of Section 2252A(a)(5)(B).

In discussing these two offenses with petitioner while obtaining his guilty pleas, the military judge used the same

definitions of "child pornography" as contained in Section 2256(8). (R. at 57, 78).

On July 19, 2001, the United States Court of Appeals for the Armed Forces granted review on the following issue:

> WHETHER APPELLANT'S CONVICTIONS UNDER SPECIFICATIONS 2 AND 3 OF ADDITIONAL CHARGE II MUST BE SET ASIDE BECAUSE THE DEFINITIONS OF CHILD PORNOGRAPHY USED TO SUPPORT THOSE CONVICTIONS ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

On September 6, 2001, the United States Court of Appeals for the Armed Forces affirmed the decision below, citing their earlier decision in *United States v. James*, 55 M.J. 297 (2001) (App. C at 3a). In *James,* the Court of Appeals for the Armed Forces held that the definitions contained in Section 2256(8) are constitutional.[2] *Id.* at 7a, 55 M.J. at 299. In so doing, the Court of Appeals for the Armed Forces expressly disagreed with the decision of the United States Court of Appeals for the Ninth Circuit in *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999), *cert. granted sub nom, Holder v. Free Speech Coalition*, 531 U.S. 1124 (2001) (No. 795, 2000 term, renamed *Ashcroft v. Free Speech Coalition*). *Id.* This Honorable Court granted *certiorari* in *Free Speech Coalition* and has heard oral argument in the case.

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[2] The *James* court also decided that James's appeal failed on an independent ground because James admitted that he believed that the pornography in his case actually contained minors. *James* at 9a-10a, 55 M.J. at 301. Petitioner has not made such an assertion in this case.

REASONS FOR GRANTING THE WRIT

In *New York v. Ferber*, 458 U.S. 747 (1982), this Court held that sexually explicit material depicting actual children is unprotected by the First Amendment regardless of whether it is obscene. This ruling was based on documented evidence that minors can suffer serious harm by participating as performers in sexually explicit materials. *Id.* at 758-59. This Court therefore has made clear that Congress can ban child pornography to the extent that the proscribed material portrays sexually explicit conduct by actual children. *Id.* at 764.

The anchoring of the constitutional justification to actual harm to genuine children, however, was not followed on September 30, 1996, when Congress passed the Child Pornography Prevention Act of 1996.[3] Under this Act, as codified in Section 2256(8), child pornography is now defined as any sexually explicit material that: (1) depicts actual minors; (2) depicts persons who appear to be minors; (3) modifies or alters the image of an identifiable minor so that the minor appears to be engaging in sexually explicit conduct; or (4) is advertised or described so as to convey the impression that it depicts a minor.

In *Free Speech Coalition v. Reno*, the United States Court of Appeals for the Ninth Circuit examined the definitions of child pornography in Section 2256(8) (which are applied to Section 2252A) and held that the First Amendment prohibits Congress from enacting a statute that makes criminal the generation of images of fictitious children engaged in imaginary but explicit sexual conduct.

---

[3] The Child Pornography Prevention Act of 1996 amended Title 18 of the United States Code by revising Sections 2251, 2252, and 2256, and by adding Section 2252A.

198 F.3d. at 1086. Specifically, the Court held "that the language of 'appears to be a minor' set forth in Subsection 2256(8)(B) and the language 'conveys the impression' set forth in Subsection 2256(8)(D) are unconstitutionally vague and overbroad." *Id.* at 1097.

In petitioner's case, the military judge used the very definitions containing the language "appears to be a minor" and "conveys the impression" that the *Free Speech Coalition* court found to violate the Constitution. (R. at 57, 78). As this Court has noted, a guilty plea is not voluntary if an accused "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976). Therefore, petitioner's convictions under Section 2252A must be set aside because they were obtained when the military judge based his explanation of the offenses to petitioner on the unconstitutionally vague and overbroad definitions of child pornography contained in Section 2256(8).

CONCLUSION

The decision of the United States Court of Appeals for the Armed Forces is in conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *Free Speech Coalition v. Reno*, *supra*, a case currently pending before this Court. Petitioner asks that this Honorable Court find that, consistent with the decision of the United States Court of Appeals for the Ninth Circuit, petitioner's plea was involuntary because it was based on definitions that are unconstitutionally vague and overbroad.

The petitioner therefore respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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December 2001

Appendix A

United States Court of Appeals for the Armed Forces
Washington, D.C. 20442-0001

UNITED STATES,	)	USCA Dkt. No. 01-0403/AF
	)	Crim.App. No. 33671
Appellee	)	
	)	
v.	)	ORDER GRANTING REVIEW
	)	
Barry V.	)	
O'CONNOR [*SSAN omitted*]	)	
Appellant	)	

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 19th day of July, 2001,

ORDERED:

That said petition is hereby granted on the following issue:

WHETHER APPELLANT'S CONVICTIONS UNDER SPECIFICATIONS 2 AND 3 OF ADDITIONAL CHARGE II MUST BE SET ASIDE BECAUSE THE DEFINITIONS OF CHILD PORNOGRAPHY USED TO SUPPORT THOSE CONVICTIONS ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

No Briefs will be filed under Rule 25.

For the Court,

/s/ James T. Harper
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (JACOBSON)
Appellate Government Counsel (ROMER)

Appendix B

United States Court of Appeals for the Armed Forces
Washington, D.C. 20442-0001

UNITED STATES,	)	USCA Dkt. No. 01-0403/AF
	)	Crim.App. No. 33671
Appellee	)	
	)	
v.	)	ORDER
	)	
	)	
Barry V.	)	
O'CONNOR [*SSAN omitted*]	)	
Appellant	)	

On consideration of the granted issue at 55 MJ [367] (Daily Journal July 19, 2001), and in view of this Court's decision in *United States v. James*, 55 MJ 297 (2001), it is, by the Court, this 6th day of September, 2001,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is affirmed.

For the Court,

James T. Harper
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (JACOBSON)
Appellate Government Counsel (ROMER)

Appendix C

UNITED STATES, Appellee

v.

Terry W. JAMES, Machinist's Mate First Class
U.S. Navy, Appellant

No. 00-0592
Crim. App. No. 99-0435

United States Court of Appeals for the Armed Forces

Argued February 6, 2001

Decided August 15, 2001

SULLIVAN, J., delivered the opinion of the Court, in which CRAWFORD, C.J., GIERKE, EFFRON, and BAKER, JJ., joined.

Counsel

For Appellant: *Lieutenant Jonathan R. Goodman*, JAGC, USNR (argued).

For Appellee: *Colonel M. W. Fisher, Jr.*, USMC (argued); *Lieutenant Commander Philip Sundel*, JAGC, USNR (on brief).

Military Judge: Robert G. Sokoloski

Judge SULLIVAN delivered the opinion of the Court.

On July 13, 1998, appellant was tried by a military judge sitting alone at a special court-martial at the U.S. Trial Service Office Guam. Pursuant to his pleas, he was found guilty of one specification of possessing child pornography and two specifications of transporting child pornography in interstate commerce, in violation of 18 USC § 2252A as assimilated by Article 134, Uniform Code of Military Justice, 10 USC § 934. The military judge sentenced appellant to a bad-conduct discharge, confinement for 150 days, and reduction to pay grade E-1. On

March 8, 1999, the convening authority approved the sentence as adjudged, and on May 19, 2000, the Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence. *See United States v. James*, 53 MJ 612 (N.M. Ct. Crim. App. 2000). [1]

On November 16, 2000, this Court granted review of the following issue:

WHETHER THE LOWER COURT ERRED IN FINDING THAT THE STATUTORY LANGUAGE "APPEARS TO BE A MINOR" AND "CONVEYS THE IMPRESSION" THAT A PICTURE PORTRAYS A MINOR WITHIN 18 USC § 2252A WAS NOT UNCONSTITUTIONALLY OVERBROAD BOTH ON ITS FACE AND AS APPLIED TO APPELLANT.

We hold that the appellate court below did not err in affirming appellant's guilty-plea convictions of possessing and transporting child pornography under 18 USC § 2252A and Article 134. *See generally United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999), *cert. denied*, 528 U.S. 844 (1999).

The record of trial shows that during 1998, appellant served aboard the USS FRANK CABLE (AS 40), stationed at Guam. Appellant lived in government quarters with another person, M.H. The roommate owned a personal computer and paid monthly fees for Internet access through a commercial provider. He also allowed appellant to use both the computer and the Internet account.

From February to April 1998, appellant used the roommate's Internet account to "swap" files by downloading pictures from an Internet site in exchange for posting pictures to that same site. Appellant "intentionally picked sites . . . advertis[ing] 'pre-teen pics' and downloaded" at least three files that contained "pictures of minors engaged in explicit sexual activity. After downloading" these files, "appellant viewed" the pictures "and saved" the images onto his roommate's computer.

On April 22, 1998, appellant entered a chat room offering a conversation on "Dad and daughter sex." While accessing the chat

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[1] The typed original of the opinion below is dated May 19, 2000.

room through his roommate's account, appellant engaged in a discussion with someone called "Fast Girl," in fact the screen name of a male agent of the U.S. Customs Service posing as a female pedophile. "[A]t Fast Girl's request, appellant uploaded a picture of a child he believed to be a minor engaged in sexually explicit activity" and sent the picture electronically to Fast Girl. "Two days later, . . . appellant uploaded" another fifteen pictures which he "believed" were "minors engaged in sexually explicit activity" and sent them electronically to Fast Girl. The agent posing as Fast Girl received all the pictures back in continental United States. 53 MJ at 612-13.

Appellant admitted the above facts and pleaded guilty to violating 18 USC § 2252A on at least three occasions.[2]

Appellant asks this Court to set aside his convictions under 18 USC § 2252A and Article 134 for possessing and transporting child pornography. He contends that this federal statute is unconstitutional because it violates the First Amendment. *Cf. United States v. Mento*, 231 F.3d 912, 915 (4th Cir. 2000), *cert. filed* Jan. 22, 2001. He particularly argues that this statute is constitutionally overbroad because it not only prohibits sexually explicit depictions of actual children, but also such pictures of virtual or apparent children as well. He asks that his guilty pleas to violating this unconstitutional statute be set aside as improvident. *See generally United States v. Prater*, 32 MJ 433, 436 (CMA 1991) (an accused must "show a 'substantial basis' in law and fact" exists for overturning a guilty plea on appeal).

The Child Pornography Prevention Act of 1996 proscribes knowing transportation, knowing receipt, knowing distribution, and knowing possession of child pornography in interstate commerce "by any means, including by computer." See 18 USC §

---

[2] 18 USC § 2252A was amended on October 30, 1998 (Pub. L. No. 105-314, 112 Stat. 2978 (1998)) which eliminated "'3 or more images' each place that term appears and inserting 'an image.'" Appellant's offenses were alleged to have occurred between February and April 1998.

2252A(a).[3] The term "child pornography" is broadly defined in the U.S. Code. It includes not only a "visual depiction . . . of sexually explicit conduct . . .(A) . . . involv[ing] the use of a minor engaging in sexually explicit conduct"; but also "(B) such visual depiction [which] is, or *appears* to be, of a minor engaging in sexually explicit conduct" and "(D) such visual depiction . . . *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct[.]" *See* 18 USC §§ 2256(8) (emphasis added). The military judge explained to appellant:

> The term "child pornography" means any visual depiction including photograph, video, picture of computer-generated image or picture, whether made or produced by electronic mechanical or other means of sexually explicit conduct, where the production of such visual depiction involves the use of a minor engaging in sexual [sic] explicit conduct. Such visual depiction is or appears to be of a minor engaging in sexually explicit conduct or such visual depiction has been created, adapted or modified to appear that of an unidentifiable minor

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[3] "(a) Any person who – (1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography; (2) knowingly receives or distributes – (A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or (B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

* * *

or (5) either – (A) in the special maritime or territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images of child pornography; or (B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, shall be punished as provided in subsection (b).

or it contains a visual depiction of a minor engaging in sexually explicit conduct. Do you understand that?

ACC: Yes, sir.

MJ: The definition of "child pornography," "visual depiction," and "minor" again come under or come from section 2256 of Title 18 of the United States Code. . . .

R. 19.

Appellant argues that the "appears to be" and "conveys the impression" language of the statute infringes on speech protected by the First Amendment of the U.S. Constitution. He largely adopts the position of the Ninth Circuit in *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999), *cert. granted*, 121 S.Ct. 876 (2001). There, the Ninth Circuit recognized that the definition of child pornography found in the federal statute (18 USC 2256(8)) constituted a "content-based classification of speech." *Reno*, 198 F.3d at 1091. As such, it stated that the Government had to show both "a compelling interest" served by this statute and how that statutory definition was "narrowly tailored" to fit that interest. Id. Focusing on the "compelling interest" of the state in proscribing child pornography mentioned by the Supreme Court in *New York v. Ferber*, 458 U.S. 747 (1982), the Ninth Circuit held that the state had no compelling interest in regulating virtual or apparent child pornography where no minor was actually harmed. *Reno*, 198 F. 3d at 1096. "Nothing in *Ferber* can be said to justify the regulation of such materials other than the protection of the actual children used in the production of child pornography." *Id* at 1092.

We disagree with the Ninth Circuit's holding in *Free Speech Coalition v. Reno, supra*, and hold the definition of "child pornography" in 18 USC §§ 2256(8) and the prohibitions in 18 USC § 2252A are constitutional. The majority of the other federal courts of appeals that have considered this same issue have held this section of the Act to be constitutional. *See United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999); *see also United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999); *United States v. Mento*, 231 F. 3d 912 (4th Cir. 2000); and *United States v. Fox*, 248 F.3d 394 (5th Cir. 2001). In particular, we adopt the rationale of the First Circuit as elaborated in *United States v. Hilton, supra* at 72

(holding that "appears to be" language added prohibition against virtual child pornography to prohibition against actual child pornography as particularly defined in original statute).

The First Circuit in *Hilton* opined that suppressing the "virtual" or apparent child-pornography trade constituted a compelling government interest that justified the expanded definition of "child pornography" found in the federal statute. It acknowledged that this federal statute created a "content-based" restriction, 167 F.3d at 69, and applied the same "compelling state interest-narrow tailoring" test as the Ninth Circuit in *Reno*. *See Hilton*, 167 F.3d at 68. However, looking to the decision in *Osborne v. Ohio*, 495 U.S. 103 (1990), it maintained that the Supreme Court has recognized a broader governmental interest in regulating child pornography than approved in *Ferber*. *See Hilton*, 167 F.3d at 70,73. As such, the First Circuit upheld the statute as constitutional:

> As technology improves and access to technology increases, efforts to eradicate the child pornography industry could be effectively frustrated if Congress were prevented from targeting sexually explicit material that "appears to be" of real children. The government's interest in addressing these forms of child pornography is no less powerful than in instances where an actual child is actually used and abused during the production process. We will not second-guess Congress's decision to address the social ills posed by the various types of virtual child pornography.
>
> *Hilton*, 167 F.3d at 73.[4] We agree.

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[4] The First Circuit recounted Congress' stated reasons for broadening the definition of child pornography: "First, the legislature desired to reduce the sheer volume of computerized child pornography that could be used by child molesters and pedophiles to 'stimulate or whet their own sexual appetites.' S. Rep. 104-358, at pt. IV(B). Second, Congress sought to ban computer-generated images that are 'virtually indistinguishable' from those of real children, but are made without live children. Id. . . . Third, the new law was designed to protect the privacy of actual children whose innocuous images are altered to create sexually explicit pictures. . . . Fourth, Congress wished to deprive child abusers of a 'criminal tool' frequently used to facilitate the sexual abuse of children." *Hilton*, 167

In any event, even if the First Circuit's approach to 18 USC § 2252A is not followed, appellant's convictions need not be invalidated. A narrow construction of this statute applying it only to pictures of actual minors would clearly render this statute constitutional even under the Ninth Circuit's decision. *See Free Speech Coalition v. Reno, supra* at 1086. Here, appellant's admissions "objectively support" his pleas of guilty to violations of the more narrowly construed statute directed at sexual pictures of actual minors. *See generally United States v. Shearer*, 44 MJ 330, 334 (1996) ("An inquiry into the providence of a guilty plea must establish the factual circumstances admitted by the accused which 'objectively' support his plea.").

Appellant argues that no definite proof exists in his case that the pictures at issue showed actual minors. However, in the guilty-plea context, the Government does not have to introduce evidence to prove the elements of the charged offense beyond a reasonable doubt; instead, there need only be "factual circumstances" on the record "which 'objectively' support" the guilty pleas, *i.e.*, that actual minors were in appellant's pictures. *See Shearer*, 44 MJ at 334. Here, appellant pleaded guilty to the charged violations of 18 USC § 2252A (R. 11) and admitted that actual minors were in the charged pictures.

The judge in this case explained to appellant that an element of the crimes of possessing and transporting child pornography was proof that the subjects of the pictures were minors. He said:

> The third element of Specification 1, is that the visual depiction was produced by using at least one person who was a minor engaged in this sexually explicit conduct. Do you understand that element?
>
> ACC: Yes, sir.
>
> MJ: And that element is the same for Specification 2 and Specification 3. Do you understand that?
>
> ACC: Yes, sir.

F.3d at 66-67. *See United States v. Mento*, 231 F.3d 912, 916, 918, 920-22 (4th Cir. 2000).

R. 16. Moreover, appellant particularly admitted that the subjects of the pictures were minors:

> Q. Now, why do you believe that- as far as describes those files- why you believe the files to be described as child pornography?
>
> A. Well, they depicted young females under the age of eighteen, which as you stated, that they, uh, they are minors. I believe that the pictures depicted minors under the age of eighteen and at least four contained minors engaged in sexual activity.
>
> * * *
>
> Q. Do you believe that one of those persons involved in that conduct was a minor?
>
> A. I believe the person in the picture was under eighteen, yes, sir.
>
> Q. Now, when you say the person in the picture, was there one person or more than one?
>
> A. There were two persons in the picture, sir. The person I'm referring to- is I believe, the young lady, was a minor. I am not- I am not sure of the male.
>
> R. 27, 34.

Appellant's admissions concerning the age of the subjects of the pictures in his case were amply supported by the pictures themselves which are attached to this record as exhibits. *See* R. 54-55 and Pros. Ex. 2-4. In addition he admitted that he went to various web sites looking for pictures of "pre-teen[s]" and downloaded pictures from files labeled in a manner reasonably suggesting depiction of actual minors. R. 26, 38. Finally, appellant admitted that he visited chat rooms on the Internet with topics such as "Dad and daughter sex" where pictures of minors were regularly requested and provided. R. 32. Viewed in its entirety, we conclude that the factual circumstances reflected in the record "objectively support" appellant's guilty pleas to possessing and transporting child pornography depicting actual minors.

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Appendix D

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman BARRY V. O'CONNOR
United States Air Force

ACM 33671

25 January 2001

Sentence adjudged 5 March 1999 by GCM convened at Hurlburt Field, Florida. Military Judge: Bruce T. Brown (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 12 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Jeanne M. Rueth, Colonel James R. Wise, and Captain Michael J. Apol.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Ronald A. Rodgers, and Major Karen L. Manos.

Before

SPISAK, ROBERTS, and CONNELLY
Appellate Military Judges

OPINION OF THE COURT

CONNELLY, Judge:

Consistent with his pleas, the appellant was convicted by a military judge sitting as a general court-martial of sodomy, indecent acts on a female under 16 not his wife, obstruction of justice, wrongful receipt of child pornography, and wrongful possession of child pornography. Articles 125, 134, UCMJ, 10 U.S.C. §§ 925, 934; 18 U.S.C. § § 2252A(a)(2)(A), (5)(B). His approved sentence consists of a dishonorable discharge, confinement for 12 years and reduction to E-1.

The appellant complains, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that the military judge erred by failing to recuse himself, that his trial defense counsel was ineffective and that his sentence was inappropriately severe. We find no error and affirm.

RECUSAL OF MILITARY JUDGE

On the first day of trial, the appellant pled guilty to committing sodomy and numerous indecent acts on his stepdaughter over a three-year period. After appellant's plea was accepted the court recessed for the evening. The military judge went to an off-base restaurant for dinner. Unknown to the judge, the victim and her family were dining at the same restaurant. The victim's grandfather approached the judge's table, introduced himself, and pointed to the victim seated nearby. The judge told the grandfather that "he thought it would be best under the circumstances that we not have any further conversations," at which point the grandfather "agreed and returned to his table." The judge could see the victim and her family during dinner, but could not hear any of their conversations. The next morning, the judge disclosed to counsel and the appellant what had occurred and no one raised any objection.

On appeal, the appellant asserts that it was plain error for the military judge not to recuse himself because, as a result of the restaurant encounter, he gained an impermissible familiarity with the victim, and his continuance on the case would raise a question in the mind of a reasonable person about the judge's impartiality. Our standard of review on this issue is abuse of discretion. *United*

States v. Butcher, 53 M.J. 711 (A.F. Ct. Crim. App. 2000). R.C.M. 902(a) states that a military judge "shall disqualify himself ... in any proceeding in which that military judge's impartiality might reasonably be questioned." *Accord Uniform Code of Judicial Conduct for Military Trial and Appellate Judges and Uniform Regulations and Procedures Relating to Judicial Discipline*, Canon 2; TJAGPL-3. This rule requires us to determine whether an objective, disinterested observer fully informed of the facts would have a significant doubt that the appellant received a fair trial. *United States v. Berman*, 28 M.J. 615, 617-18 (A.F.C.M.R. 1989).

The military judge went to the off-base restaurant without any knowledge that the victim and her family would be present. The judge had no personal contact with the victim at the restaurant other than observing her eat. The military judge immediately discontinued the conversation initiated by the grandfather and reported the incident the following morning to counsel and the appellant. No objective, disinterested observer informed of the above facts would doubt the military judge's impartiality.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant claims that trial defense counsel committed four errors that, taken as a whole, denied him effective assistance of counsel. These errors involve appellant's disclosure of confidences to a temporary defense paralegal on loan from the base legal office, failure to move for the military judge's recusal, an ineffective sentencing argument, and failure to object to the prosecution's improper sentencing argument.

The Supreme Court has set forth a two-pronged test to assist appellate courts in determining questions of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland's* two-prong test requires the appellant to first show that counsel's performance was so deficient, the errors so serious that the counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Next the appellant must show prejudice to his ability to receive a fair trial, the result of which was reliable. *Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993), *quoted in United States v. Christy*, 46 M.J. 47, 50 (1997).

Appellant is unable to show that his trial defense counsel's performance was deficient, much less that he suffered any prejudice. Appellant first asserts that his trial defense counsel had him disclose confidences to a temporary defense paralegal without informing him that the paralegal's normal job was in the base legal office. The record is silent as to what, if any, confidences were disclosed by the appellant to the paralegal and why the appellant believes these confidences were disclosed to the government. Indeed, the appellant in his declaration filed with this Court admits that he "cannot specifically prove [the paralegal] disclosed any of my confidences to the prosecution." The record is simply devoid of any evidence of ineffectiveness concerning the temporary defense paralegal. As for the second assertion regarding counsel's failure to press for the military judge's recusal following a chance encounter with the victim's grandfather at an off-base restaurant, this issue has been adequately disposed of above and does not present an issue regarding counsel's effectiveness.

The remaining two allegations of ineffectiveness concern the trial defense counsel's sentencing argument which is characterized by appellant as "very weak and poorly presented" and his counsel's failure to object to a portion of trial counsel's sentencing argument. We have reviewed both sentencing arguments and find no error. Trial defense counsel's argument was logical and comprehensive. It rebutted several contentions made in the government's sentencing argument, stressed the importance of appellant's guilty plea and remorse, commented on the importance of rehabilitation in fashioning any sentence, and stressed appellant's positive duty performance, especially during the period awaiting trial. It concluded with a request that appellant be given a second chance and be sentenced to 5 years' confinement. In light of the horrific nature of the charges for which the appellant stood convicted, trial defense counsel's sentencing argument was appropriate and certainly not ineffective.

In his argument, trial counsel disparaged two grades on appellant's most recent EPR—an overall evaluation of 4 and a rating of "acceptable" on the conduct block. Trial counsel's comments on this point were minor, consisting of six lines in a six page sentencing argument. In addition, while trial defense counsel

did not object, he did address these comments in his sentencing argument stressing that while awaiting trial (the period of time covered by the EPR) appellant committed no new offenses and complied with the no-contact order given him by his commander. We find trial defense counsel's performance in this regard satisfactory.

SENTENCE APPROPRIATENESS

The standard of review on issues of sentence appropriateness is whether, considering the entire record, the character of the offender and the nature of the offenses for which he is being sentenced, the sentence adjudged or approved is appropriate. *United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990). Appellant alleges that while his offenses were serious, they do not warrant a dishonorable discharge and 12 years in jail. We disagree. Considering the entire record and the egregious nature of the offenses committed over a lengthy period of time, we find the sentence appropriate.

CONCLUSION

We conclude the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the approved findings of guilty and the sentence are

AFFIRMED.

OFFICIAL

//s//
LAURA L. GREEN
Clerk of Court

No. 01-836

JAN 29 2002

In the Supreme Court of the United States

BARRY V. O'CONNOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the prohibition of any visual depiction that "appears to be[] of a minor engaging in sexually explicit conduct" in the Child Pornography Prevention Act of 1996, 18 U.S.C. 2252A, 2256(8)(B) (Supp. V 1999), violates the First Amendment.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the Court of Appeals for the Armed Forces (Pet. App. 2a) is reported at 56 M.J. 141. The opinion of the Air Force Court of Criminal Appeals (Pet. App. 11a-15a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on September 6, 2001. The petition for a writ of certiorari was filed on December 3, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following trial by a general court-martial, Pet. 2; Pet. App. 12a, and, in accordance with pleas of guilty,

petitioner was convicted of two specifications of forcible sodomy on a child under the age of 16, in violation of 10 U.S.C. 925 (Art. 125, Uniform Code of Military Justice (UCMJ)), four specifications of indecent acts on a female under 16 years of age in violation of 10 U.S.C. 934 (Art. 134, UCMJ); one specification of obstruction of justice, in violation of 10 U.S.C. 934 (Art. 134, UCMJ); and one specification of receipt of child pornography and one specification of possession of child pornography, in violation of 18 U.S.C. 2252A (Supp. V 1999), as assimilated by 10 U.S.C. 934 (Art. 134, UCMJ). Court-Martial Order of Apr. 20, 1999; Pet. App. 12a. As approved by the convening authority, his sentence included a dishonorable discharge, confinement for 12 years, and reduction to the lowest enlisted grade. *Ibid.* Both the United States Air Force Court of Criminal Appeals and the United States Court of Appeals for the Armed Forces affirmed. *Id.* at 11a-15a; *id.* at 2a.

1. The definition of the phrase "child pornography" as used in 18 U.S.C. 2252A (Supp. V 1999) and assimilated by 10 U.S.C. 934 (Article 134, UCMJ)* is contained in 18 U.S.C. 2256(8) (Supp. V 1999). That Section provides:

> "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

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* Section 934 prohibits, inter alia, the commission of "crimes and offenses not capital." Such offenses consist of "noncapital crimes and offenses prohibited by the United States Code." See *Manual for Courts-Martial United States* para. 60c(4)(b) (2000 ed.).

> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

18 U.S.C. 2256(8) (Supp. V 1999). During the guilty plea hearing, the military judge defined the phrase "child pornography," in accordance with the definition contained in Section 2256(8). In particular, he explained that it

> means any visual depiction, including any photograph, film, video, picture, or computer or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where, (a) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (b) such visual depiction is or appears to be of a minor engaging in sexually explicit conduct; (c) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or, (d) such visual depiction [i]s advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that [the] material is or contains a visual

depiction of a minor engaging in sexually explicit conduct.

Tr. 57. At the conclusion of the military judge's explanation, petitioner stated that he understood the definition of "child pornography." Tr. 58. He then acknowledged that, on several occasions, he had shown computer images of child pornography to a female minor. Tr. 58-59. He explained that the subjects, who appeared to be minors, were engaged in "[v]arious sexual displays or actions." Tr. 59. On the basis of these admissions, the military judge accepted petitioner's pleas of guilty. Tr. 117.

2. On appeal to the United States Air Force Court of Criminal Appeals, petitioner claimed that the military judge should have recused himself from further participation in the court-martial because the victim's grandfather had approached the judge in a restaurant during an evening recess. Pet. App. 12a. The judge immediately told the victim's grandfather that they should not converse, and the victim's grandfather returned to his table in the restaurant. *Ibid.* Petitioner also claimed that his trial defense counsel's representation was inadequate. *Id.* at 13a. That court rejected both claims and affirmed the findings and the sentence. *Id.* at 13a, 15a.

3. The United States Court of Appeals for the Armed Forces granted review of a question raised for the first time in that court: whether petitioner's convictions on the child pornography counts should be set aside because the definition of child pornography, as explained to petitioner, was unconstitutionally vague and overbroad in that it included depictions of sexually explicit conduct by persons who appear to be minors and depictions presented in a manner that conveys the

impression that the depictions are of minors engaged in sexually explicit conduct. Pet. App. 1a; Appellant C.A. Supp. Pet. 12-13.

4. In *United States* v. *James*, 55 M.J. 297, 298 (C.A.A.F. 2001), the court of appeals held that the inclusion in the definition of child pornography of a depiction that "appears to be" and "conveys the impression" of a minor engaging in sexually explicit conduct does not violate the First Amendment. Relying on *United States* v. *Hilton*, 167 F.3d 61 (1st Cir.), cert. denied, 528 U.S. 844 (1999), the court reasoned that, although the definition constitutes a content-based restriction on the exercise of First Amendment rights, Congress has a compelling interest in regulating child pornography and that the definition of "child pornography," including "virtual child pornography," is narrowly tailored to fit that interest. Pet. App. 8a. In so holding, it expressly rejected the contrary decision of the Ninth Circuit in *Free Speech Coalition* v. *Reno*, 198 F.3d 1083 (1999). Pet. App. 7a. Relying on its decision in *James*, the court below affirmed petitioner's conviction. *Id.* at 2a.

DISCUSSION

Relying on *Free Speech Coalition* v. *Reno*, 198 F.3d 1083 (9th Cir. 1999), petitioner contends (Pet. 4-5) that, insofar as the definition of child pornography governing Section 2252A includes depictions of fictitious children engaged in explicit sexual behavior, it is unconstitutionally overbroad and that his convictions under that statute (as assimilated by 10 U.S.C. 934) should therefore be set aside. Petitioner frames his claim as a challenge to the voluntariness of his guilty plea. As petitioner observes (Pet. 3), while this case was on appeal, the Court granted the government's petition for

a writ of certiorari in *Free Speech Coalition*, *supra*, now styled *Ashcroft* v. *Free Speech Coalition*, No. 00-795 (argued Oct. 30, 2001). That case presents the same conflict for resolution as is presented in this petition. Accordingly, the petition in this case should be held pending the Court's decision in *Free Speech Coalition*.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision of the Court in *Ashcroft* v. *Free Speech Coalition*, No. 00-795 (argued Oct. 30, 2001), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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JANUARY 2002